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**BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION**

INQUIRY CONCERNING A JUDGE, NO. 01-244  
(Judge Charles W. Cope)

Case No. SC01-2670

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**SPECIAL COUNSEL'S MOTION TO STRIKE**

**RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Special Counsel hereby moves to strike the Motion for Partial Summary Judgment filed by Judge Cope and states:

1. The Florida Judicial Qualifications Commission Rules do not authorize a motion for summary judgment to be filed before or considered by the Hearing Panel.

2. Motions for summary judgment are unique to civil actions and are authorized only by Rule 1.510, Florida Rules of Civil Procedure. Rule 12(a) provides that the rules of civil procedure are applicable in proceedings before the Hearing Panel "except where inappropriate or as otherwise provided by these rules." FJQCR 12(a); see also, e.g., In re Graziano, 696 So. 2d 744, 752 (Fla. 1997) (holding that rules regarding jury instructions do not apply).

3. A motion for summary judgment is wholly inappropriate in these proceedings because both the Constitution of the State of Florida and the Florida Judicial Qualifications Commission Rules expressly require the Hearing Panel to conduct a formal evidentiary hearing on all charges filed by the Investigative Panel. See art. V, § 12(b), Fla. Const.; FJQCR 7(a), 11. Indeed, the rules do not authorize the Hearing Panel to determine the judge's guilt or innocence of the charges until "after conclusion of the hearing and consideration of the

issues presented for decision." FJQCR 19.

4. Moreover, the Hearing Panel may only consider "legal evidence" (i.e., evidence that would be admissible under the Florida Evidence Code and Florida Statutes). All of the depositions offered by Judge Cope in support of his motion are inadmissible hearsay and no foundation for admitting them into evidence pursuant to Rule 1.330, Florida Rules of Civil Procedure, has been laid (nor could possibly be laid with respect to the deposition of Judge Cope).

5. Additionally, summary judgment procedures simply make no sense in the context of proceedings before the Hearing Panel. While the Chair of the Hearing Panel is authorized to rule on pre-trial motions, any ruling is subject to review by the entire panel. JQCR 7(b). Thus, each member of the Hearing Panel would be required to review the hundreds of pages of depositions filed by Judge Cope in support of his motion, as well as materials that might be submitted in opposition by the Special Counsel. There is simply nothing "summary" about such procedures.

6. Moreover, to the extent motions for summary judgment serve the laudable purpose of winnowing out unsupported claims without the need for a trial, that purpose is already served in cases before the Judicial Qualifications Commission, because before a case can proceed to a hearing, the Investigative Panel must have already performed an investigation, considered the evidence, made a determination of probable cause, and filed the charges with the Supreme Court of Florida for hearing by the Hearing Panel. Art. V, § 12(a)(4), (b); FJQCR 6(f). For the Hearing Panel to summarily decide charges without an evidentiary hearing would

violate the dignity of the Investigative Panel's constitutionally mandated authority and exceed the jurisdiction and proper authority of the Hearing Panel.

7. Even if Rule 1.510 could apply in these proceedings, as a practical matter, there is insufficient time for the Hearing Panel to consider a summary judgment motion at this time. The Hearing Panel would be required to set a hearing on the motion no earlier than June 18, 2002. See Fla. R. Civ. P. 1.510(c) (motion for summary judgment cannot be filed less than twenty days prior to hearing thereon). This case is set for final hearing to begin on June 24, less than one week later. Six days is simply insufficient time for the Chair to review the long record in this case and for the remainder of the panel to then review this decision pursuant to Rule 7(b).

8. Finally, the Motion for Partial Summary Judgment is deficient because it fails to present record evidence that demonstrates an absence of an issue of disputed fact. The motion is practically devoid of citations of the main factual allegations contained therein. More importantly, a review of the deposition transcripts refutes most of the allegations in the motion. In short, Judge Cope's "spin" on his alleged facts is largely inaccurate and, at the very least, is merely one interpretation of evidence that is equally susceptible of an interpretation supporting the charges against Judge Cope.

9. Florida's summary judgment standard places the burden on the movant to prove "conclusively" and "irrefutably" that no genuine issue of material fact exists as to any issue, even those that the nonmovant must prove at trial. Holl v. Talcott, 191 So. 2d 40, 45 (Fla. 1966); Tamm v. Bradley, 696 So. 2d 816 (Fla. 2d DCA 1997); see also Johnson v. Circle K

Corp., 734 So. 2d 536 (Fla. 1st DCA 1999); Keogh v. Wimpoly, 585 So. 2d 302 (Fla. 2d DCA 1991); Fla. East Coast Railway Co. v. Metropolitan Dade County, 438 So. 2d 978 (Fla. 3d DCA 1983). Summary judgment is only appropriate where "the record affirmatively showed that the plaintiff could not possibly prove [its] case, and not because [it] had simply failed to come forward with evidence doing so." Visingardi v. Tirone, 193 So. 2d 601, 605 (Fla. 1967).

WHEREFORE, the Motion for Partial Summary Judgment should be stricken.

### CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by facsimile and regular U.S. mail to: **Louis Kwall, Esq.**, Kwall, Showers & Coleman, P.A., 133 N. St. Harrison Ave., Clearwater, Florida 33755; **Robert W. Merkle, Jr., Esq.**, Co-Counsel for Respondent, 5510 W. La Salle Street, #300, Tampa, Florida 33607-1713; **Judge James R. Jorgenson**, Chair of the Judicial Qualifications Commission Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Ave., Miami, Florida 33175-1716; **John Beranek, Esq.**, Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box 391, Tallahassee, Florida 32301; **Brooke S. Kennerly**, Executive Director of the Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; **Thomas C. MacDonald, Jr., Esq.**, General Counsel to the Investigative Panel of the Judicial Qualifications Commission, 100 North Tampa Street, Suite 2100, Tampa, Florida 33602 this 3rd day of June, 2002.

By:  
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